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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-412

ROBERT E. IANNELLI AND DOLORES IANNELLI,
HIS WIFE,
Petitioners,

v.

H. ALAN LONG, District Director, Pittsburgh,
Pennsylvania and JOHNNIE M. WALTERS,
Commissioner of the Internal Revenue
of the United States of America,
Successor to HAROLD T. SWARTZ,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on June 29, 1973.

CITATIONS TO OPINIONS BELOW

The district court's opinion granting injunctive relief is reported at 333 F. Supp. 407 and is reprinted in Appendix A, *infra*. The opinion of the Court of Appeals is not yet reported and is reprinted in Appendix B, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1973. A timely petition for rehearing was filed and was denied July 26, 1973. (Appendix C, *infra*.) The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where the Internal Revenue Service under the guise of the collection of taxes requires taxpayers to make a choice between the exercise of their Fifth Amendment rights or the forfeiture of all of their property, does not the district court have the power to grant limited injunctive relief in order to preserve the rights of the taxpayers and the government.

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix D, *infra*.

STATEMENT OF THE CASE

On November 3, 1971, the United States District Court for the Western District of Pennsylvania enjoined the Internal Revenue Service from executing on certain liens or in any other manner attempting to effect collection of a wagering tax assessment placed against the husband and wife petitioners here. The

Internal Revenue Service appealed and the Order of the district court was reversed by a panel of the United States Court of Appeals for the Third Circuit on June 27, 1973. A timely petition for rehearing having been denied, petitioners are seeking a writ of certiorari, in support of which they set forth the following summary of the record below:

On March 25, 1971, Robert and Dolores Iannelli, his wife, were indicted with others at Criminal No. 71-62 in the United States District Court for the Western District of Pennsylvania. They were charged with conspiracy and violation of certain federal anti-gambling statutes.

On May 7, 1971, Robert Iannelli received notices of excise tax assessments from the Internal Revenue Service in the amount of $712,064.51. (14A)* On May 10, 1971, identical assessment notices were sent to Robert and Dolores Iannelli marked "corrected bill", the only difference in the latter assessment notices was that the assessments were made against both husband and wife. (16A) The assessment notices demanded payment in full within ten days. Timely claims for abatement were filed by the Iannellis' accountant but the claims were rejected on July 2, 1971. Several weeks before the claims for abatement were rejected, the IRS filed liens against all of the Iannellis' property and proceeded to seize their checking and savings accounts, sealed their safe deposit boxes and levied upon all the rental income from a substantial number of rental properties owned by the Iannellis. (103A)

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* References are to the Appendix and Supplemental Appendix in the Court of Appeals.

On July 8, 1971, the Iannellis filed a Complaint for an injunction against the IRS at Civil Action No. 71-639. On July 9, 1971, the matter came on for hearing before the Honorable Wallace S. Gourley. Because of the press of other court business, Judge Gourley could not dispose of the matter that day and requested counsel for the IRS to forbear from any further collection procedures until the matter could be set for a hearing. When counsel for the IRS indicated that the IRS had no intention of refraining from further collection procedures in spite of the matter being before the court, Judge Gourley issued a Temporary Restraining Order. (26-28 Supp.A.)

The matter came on for additional hearing before Judge Gourley on July 15, 1971, at which time counsel for the IRS conceded that normal Service procedure was to stay collection until matters of this type could be judicially determined in a refund suit. (30 Supp.A) He further conceded that the government would gain nothing from the forced sale of the real estate. (30 Supp.A) This hearing was further continued until August 6, 1971.

At the hearing of August 6, 1971, the Iannellis' accountant detailed how he had been refused any explanation of the assessment, had been refused a conference and that in twenty-three years as an employee of the IRS he had never known of a taxpayer to be treated in such an arbitrary fashion.

He then testified that his investigation disclosed that the original assessment of May 7 against Robert Iannelli was valid, but that on May 10 the records were altered by the insertion of the name Dolores Iannelli in violation of IRS regulations and

that the joint assessment and subsequent levies and seizures based thereupon were illegal and invalid. The IRS conceded the invalidity and this action was dismissed by stipulation upon the IRS's representation that the joint liens would be released.

On the same day the action before Judge Gourley was dismissed, the District Director of Internal Revenue made an alleged "jeopardy" assessment against Robert and Dolores Iannelli jointly in the amount of $722,205.18. Immediately after making its alleged "jeopardy" assessment, the IRS launched into another even more aggressive round of levies and seizures and by September 20, 1971, it had relevied on and seized all of the Iannellis' bank accounts, thirty-nine pieces of rental property, their home, Robert Iannelli's life insurance policies, demanded surrender of their automobiles and indicated that it intended to sell all of their furniture as well as their home. (7A)

This action was instituted on September 27, 1971, and came on for trial on October 12, 1971. At that trial Iannellis' accountant testified to substantially the same matters that he had testified to in the first trial and in addition testified that in his opinion a joint assessment on a husband and wife was improper in the field of excise tax on wagering. The testimony further disclosed that the entire assessment was based upon certain projections made by IRS agents from wiretap information turned over to them by members of the Justice Department. (36A) Plaintiffs also offered in evidence a tape-recording of an interview on a local television station with Jules Brunner, head of the Justice Department's Strike Force in Pittsburgh. In that interview Mr. Brunner in an unmistakable reference to the case at bar indicated that the collection

procedures in this case were a valuable adjunct to criminal prosecution in terms of harassment. (64A, 65A) The harassment aspect of the Service's collection efforts was noted by the district court in its Opinion. 333 F. Supp. at 410, n.6 (106A).

In April of 1972, the petitioners here were tried on the indictment that had been brought against them in March of 1971. In that trial Robert Iannelli was convicted and subsequently sentenced to a substantial prison term. The jury could not agree on a verdict as to Mrs. Iannelli and a mistrial was declared as to her. She was subsequently retried alone and was convicted also. Each of the petitioners appealed to the United States Court of Appeals for the Third Circuit which affirmed their convictions; each of them presently has petitions for certiorari pending before this Court. (Nos. 73-64 and 73-103)

REASONS FOR GRANTING THE WRIT

The question of whether the district court has the power to enjoin the collection of wagering excise taxes in the face of Section 7421 (a) of the Internal Revenue Code of 1954 has resulted in conflicting decisions in the Courts of Appeals of the United States. The Third Circuit in the instant case has held that section 7421 (a) in light of this Court's holding in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1 (1962) is an absolute bar to injunctive relief. The Fifth Circuit, in February of this year, has held that a taxpayer would be entitled to injunctive relief if it was shown that the assessment was arbitrary, capricious and without foundation in fact. *Lucia* v. *United States*, 474 F.2d 565 (Cir. 5 1973). The Second Circuit has also upheld the right to injunctive relief. *Pizzarello* v. *United States*, 408 F. 2d 579

(Cir. 2 1969) *cert. den.* 396 U.S. 986 (1970). The Sixth Circuit in *Cole* v. *Cardoza,* 441 F. 2d 1337 (Cir. 6 1971) and the Seventh Circuit in *Collins* v. *Daly,* 437 F. 2d 736 (Cir. 7 1971) have held to the contrary.

It is important to both the government and the taxpayers involved that this conflict among the Circuits be resolved. Whether a taxpayer may obtain injunctive relief from a ruinous levy should not depend upon an accident of geography. If Florida and New York taxpayers are able to avail themselves of equitable relief can it be seriously contended that Pennsylvania taxpayers may not?

The availability of injunctive relief to a taxpayer in light of the Anti-Injunction Act (section 7421 (a) will be considered by this Court next term in the case of *Americans United, Inc.* v. *Walters,* 31 A.F.T.R. 582 (C.A. D.C.), cert. granted, No. 72-1371, June 4, 1973. The same issue has been raised in the case of *Bob Jones University v. Connally,* 472 F. 2d 903 (Cir. 4 1973), Petition for Certiorari filed April 30, 1973. In the government's memorandum in response to that petition Solicitor General Griswold joined in the request for review by this Court noting there was a conflict between the decisions of the Court of Appeals for the District of Columbia and the Fourth Circuit. Though neither of these cases involve wagering taxes, both involve the interpretation of section 7421 (a) and the holding of this Court in *Enochs, supra.*

It is respectfully suggested that the instant case involves a question of considerably greater constitutional dimension than is presented by either the *Americans United* or the *Bob Jones* cases. In this case the taxpayers were faced with a cruel and unconscionable dilemma. They were both under indictment for viola-

tions of federal law. Since the tax assessment against them was for excise taxes their only legal remedy was to pay a portion of the tax and bring a suit for refund. The burden is on the taxpayer in a refund suit not only to show that the assessment is erroneous but also to show the amount to which the government is actually entitled. *Helvering* v. *Taylor,* 293 U.S. 507 (1935). They were thus faced with the choice of either forsaking their Fifth Amendment rights or forfeiting all of their worldly possessions.

Faced with this impossible choice the taxpayers sought refuge in the equity jurisdiction of the Federal District Court. The district court reasoned a rational and reasonable remedy for the irreparable wrong sought to be imposed upon the taxpayers. The government in the district court and in the Court of Appeals placed all of its reliance on the holding in the *Enochs* case. The district court correctly concluded that it was presented with an entirely different situation than was presented by *Enochs. Enochs* did not involve Fifth Amendment questions; *Enochs* did not involve parallel refund actions and criminal actions; *Enochs* did not involve a question of forfeiture of liberty or property. *Enochs* was an adequate decision in its own time and space of American jurisprudence, but it is now eleven years later and we respectfully submit that the teachings of *Enochs* should be reviewed in the light of the serious constitutional problems presented by this case.

The Third Circuit without adverting to any relevant recent decision such as *Lucia, supra,* or *Pizzarello,* supra., took a rather simplistic view of the facts and held that the taxpayer's rights would be protected in a refund action by a request for a stay of all proceedings until their rights were fully protected by the run-

ning of the statute of limitations. In support of this holding the Third Circuit cited *United States* v. *Kordel,* 397 U.S. 1, (1970) and *DeVita* v. *Sills,* 422 F. 2d 1172, 1181 (Cir. 3 1970). Neither of the cases cited by the Third Circuit provide the petitioners here with any refuge at all. Indeed, the *DeVita* case explicitly negates such an illusory sanctuary.

In 1925 Mr. Justice Taft stated that equity will not suffer a wrong without a remedy. *Independent Wireless Tel. Co.* v. *Radio Corp.,* 269 U.S. 459, 472 (1925). In 1971 the district court in this case fashioned a limited remedy for what was certainly apprehended as a limitless wrong. In 1973 the Third Circuit Court of Appeals has given the government carte blanche to fashion the forfeiture of a suspected gambler's property under the mistaken view that the decision of this Court in *Enochs* is universally applicable.

Harsh though the precepts of *Enochs* may be, that holding did recognize that there are circumstances in which a taxpayer may be entitled to equitable relief. If it appears that the government may under no circumstances prevail, *Enochs* teaches that the exaction is merely in the guise of a tax and thus the attempted collection may be enjoined. In the instant case the government has conceded that its collection endeavors will avail it of nothing, yet as the district court noted it will continue to pursue an unusually aggressive collection policy. 333 F. Supp. at 410. If, as the government has conceded that it will realize nothing from a forced sale of the taxpayers' assets, how then is the purpose of section 7421(a) served? It seems to us as it did to the district court that the government in this case is attempting to achieve a practical forfeiture of the peti-

tioners' property under the guise of the collection of a tax.

Since the decision of this Court in *Marchetti* v. *United States,* 390 U.S. 39 (1968) and *Grosso* v. *United States,* 390 U.S. 62 (1968), the Internal Revenue Service has been somewhat hobbled in its efforts to implement the wagering tax statute. (26 U.S.C. 4401) The reaffirmance of *Marchetti* and *Grosso* by this Court in *United States* v. *United States Coin and Currency,* 401 U.S. 715 (1971), has precluded the government from forfeiting the proceeds of wagering. In this case the forfeiture proscribed by the decision of this Court in the *U. S. Coin* case was attempted in a somewhat more sophisticated manner, and which we suggest requires considered scrutiny by this Court.

The taxpayers here found themselves faced first with a federal indictment charging them with violations of the Organized Crime Control Act of 1970, 18 U.S.C. 1955. This Act became effective on October 15, 1970. Within a few days of the effective date of the Act the taxpayers were the subject of a court authorized electronic surveillance of their residence phones. The taxpayers were indicted in March of 1970; they were the recipients of a wagering tax assessment in excess of seven hundred thousand dollars in May of 1971. It is undisputed that the bulk of the assessment was based upon projections made from the wire interceptions. (97A) While the clear language of 18 U.S.C. 2516 negates any authority on the part of the government to utilize electronic surveillance as an aid to the civil collection of taxes, it is clear that the petitioners' present predicament stems almost solely from an obviously overreaching interpretation of that statute by the Internal Revenue Service.

While we recognize that in the present posture of this case the Court cannot concern itself with the legality of the means used by Internal Revenue to secure the information upon which it has based its assessment, we suggest that the Court cannot be oblivious of the petitioners' practical plight. The petitioners here, were and are faced with a ruinous levy. This levy is bottomed upon wire interceptions, the validity of which are in serious question. While the petitioners await a final determination of their criminal liability, if any there be, they will have been rendered penniless by the course of action opened to the government by the decision of the Third Circuit.

The District Court percieved the problems presented by this case and put them in proper constitutional perspective. The Third Circuit Court of Appeals disagreed. Only this Court can put the problem back into proper perspective.

CONCLUSION

It is respectfully submitted that certiorari should be granted in this case because there is a conflict among the Courts of Appeals of these United States and this conflict can only be resolved by this Court. This case is of considerable constitutional importance in terms of its Fifth Amendment problems in the context in which they arise here and will undoubtedly arise in the future.

Respectfully submitted.

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